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Case No. 2921-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: KENT COUNTY ADEQUATE	:	
PUBLIC FACILITIES ORDINANCES	:	**CONSOLIDATED**
LITIGATION	:	**C.A. No. 2921-VCN**

MEMORANDUM OPINION AND ORDER

Date Submitted: July 10, 2008
Date Decided: February 11, 2009

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NOBLE, Vice Chancellor

I. INTRODUCTION

In recent years, Respondents, the government of Kent County, Delaware (sometimes "Kent County" or the "County") and certain of its elected and appointed officials, have resorted to what some consider drastic measures in an effort to mitigate what others have perceived as the ill-effects of unprecedented housing growth on the well-being of County residents. Those efforts have included the imposition of several moratoria on new housing developments and the adoption of four new subdivision ordinances, known as the Adequate Public Facilities Ordinances (collectively, the "APFOs"), which, essentially, require developers to provide financial assistance for the County's public facilities and services—roads, schools, emergency medical services ("EMS"), and water—in connection with their development projects.[1] As a result, large-scale housing development in Kent County has been frustrated, and the County has since been mired in a maelstrom of litigation challenging its actions.

The Petitioners, a group of impacted landowners and developers, bring "procedural" challenges to the APFOs claiming that they were invalidly adopted, and, alternatively, to the extent the APFOs are deemed procedurally valid, the Petitioners assert "substantive" challenges claiming vested rights and equitable

[1] The APFOs purport to require developers to make provisions to reduce the impact of their proposed development projects on the public facilities and services available to all Kent County residents by funding necessary improvements to those public facilities.

estoppel in an effort to avoid the additional financial burdens imposed by the APFOs. In this memorandum opinion, the Court addresses cross-motions for summary judgment on Petitioners' procedural challenges.[2] Although the County's efforts in adopting the APFOs may not have been a model of ideal governance, for better or for worse, they were generally the result of a procedurally sound legislative effort. Accordingly, for the reasons set forth below, the Court, with one significant exception, denies Petitioners' motion and grants Respondents' motion for summary judgment on the submitted procedural challenges to the APFOs.

II. BACKGROUND

A. *The Parties*

Petitioners are a group of landowners and developers in Kent County, Delaware.

Respondent Kent County Levy Court is the governing legislative and executive body of Kent County, Delaware. Respondents, in their official capacities, P. Brooks Banta, Allan F. Angel, Harold K. Brode, Eric L. Buckson,

[2] By a stipulation dated May 2, 2008, the parties agreed to dismiss, without prejudice, several of Petitioners' claims (Counts IV, XV, XVII, XVIII, XIX, XX, and XXV) and to bifurcate the "procedural challenges" (Counts I, II, III, VII, VIII, IX, X, XI, XII, XIII, XIV, XXII, XXIII, and XXIV) from the "substantive challenges" (Counts V, VI, XVI, XXI, and XXVI) of Petitioners' Fourth Amended Petition. The stipulation further provided that the designated procedural challenges were to be litigated and presented to the Court in accordance with a schedule while the substantive challenges would be addressed separately. The stipulation also provided a briefing schedule for the presentation of the procedural challenges on cross-motions for summary judgment, but the parties (true to form) now disagree about the intent of the stipulation with respect to whether it contemplated the submission of *all* procedural challenges on cross-motions for summary judgment.

Bradley S. Eaby, W.G. Edmanson, and Richard E. Ennis were the elected members of the Levy Court (collectively, the "Levy Court") as of the time the cross-motions were filed.

Respondent Kent County Regional Planning Commission is the arm of the Levy Court responsible for overseeing planning and land use matters in Kent County. Respondents, in their official capacities, Albert W. Holmes, Kenneth Edwards, Paul Davis, Denise Kaercher, Clifton Coleman, Jr., Gene Thornton, and William Jester constituted the Planning Commission (collectively, the "Planning Commission) as of the time the cross-motions were filed.[3]

B. *The Adoption of the APFOs—Procedural Matters*[4]

The APFO saga began in mid-November 2005 when, in response to years of mounting political pressure, certain members of the Levy Court asked then-County Planning Director Michael Petit de Mange to draft an omnibus ordinance that would require developers to provide adequate public facilities for roads, schools, police, fire, EMS, and water. On November 29, 2005, Mr. Petit de Mange submitted a draft of the requested omnibus ordinance, designated as proposed

[3] As used throughout this opinion, the term "Respondents" refers collectively to all Respondents in this action.

[4] Petitioners challenge the various APFOs as being impermissibly vague, thereby rendering compliance impossible and also argue that the Levy Court undertook substantive revisions requiring further public hearing before the Planning Commission; for clarity, the Court will address the textual aspects of the APFOs in connection with its consideration of those various claims, *infra*. At this point, the Court intends only to review the process by which the Levy Court adopted the APFOs.

ordinance LC-05-17. At the same time, he cautioned the members of the Levy Court that it was not prepared for the required public comment or input from other state agencies and interested parties. The omnibus ordinance nonetheless was introduced at the Levy Court's meeting on November 29, 2005, but it was not adopted.

Over the next several months, County staff met with various state agencies and worked to revise proposed ordinance LC-05-17. The omnibus ordinance was again submitted to the Levy Court for consideration on March 10, 2006, but, again, the Levy Court commissioners were not satisfied with its provisions. The County staff resumed work. Eventually, the Levy Court requested that the omnibus ordinance be split into four separate ordinances addressing the discrete aspects of the proposed legislation—roads, schools, EMS, and water—so that it could move forward with those portions of the omnibus ordinance that were ready for public hearing while the County staff continued to work on the others. Accordingly, Mr. Petit de Mange prepared four separate proposed ordinances addressing the provision of adequate public facilities in Kent County: (1) LC-06-27 ("APFO Roads"); (2) LC-06-28 ("APFO Schools"); (3) LC-06-29 ("APFO EMS"); and (4) LC-06-30 ("APFO Central Water") (collectively, the "APFOs"). The APFOs then were introduced separately at a Levy Court meeting on June 13, 2006, and

immediately referred to the Planning Commission for public hearings in accordance with 9 *Del. C.* § 4911.

The Planning Commission held a duly noticed public hearing on July 19, 2006, to consider the APFOs. In general, the public commentary at the Planning Commission hearing was very supportive of the APFOs. Certain individuals and interested parties, however, raised a host of concerns and questions regarding the proposed ordinances. For example, representatives of the Delaware Office of State Planning Coordination expressed concern over some of the unrefined details of APFO Schools and requested that it be tabled to allow state officials to meet with county officials to discuss the ordinance and a mechanism for administering and calculating its proposed mitigation payment. Nevertheless, in light of the strong public support for the APFOs, and despite the noted concerns (which the Planning Commission made no effort to resolve),[5] the Planning Commission voted unanimously to recommend that the Levy Court adopt the APFOs.

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[5] Commissioner David R. Burris, then-President of the Levy Court, later commented about the Planning Commission's efforts in considering the APFOs:

> I can say this about the [Planning Commission], plain and simple they did not answer the questions posed to them when the APFO went to them. [T]he Chamber of Commerce has two pages of questions, and there was another group that put in a seven page questionnaire. [The Regional Planning Commission's] job is answer these questions[;] they did not. [T]hey simply chose to vote it on and pass it without getting questions answered. [T]his gives the Levy Court the job of answering the questions and making sure the ordinance is correct before we pass it. Now it has become a political football with everyone pointing fingers.

Following the Planning Commission hearing, County staff continued to refine the APFOs in meetings with various state agency officials. For example, in August 2006, County staff met with members of the Delaware Department of Education ("DOE") regarding APFO Schools. In reviewing the proposed ordinance, the DOE suggested that the "developer-funded mitigation program," which, as originally drafted, enabled developers to negotiate with the school districts to determine a mitigation payment, should be revised to codify a mitigation formula so that school districts that were better at negotiating with a developer would not benefit more than school districts that were less skillful in their negotiations.[6] Similarly, during that same timeframe, the County staff worked with the Delaware Department of Transportation ("DelDOT") regarding the details for administering proposed APFO Roads.

On September 27, 2006, Mr. Petit de Mange sent a memorandum to the Levy Court commissioners updating the status of the APFOs. He noted that several of the APFOs still required substantial work before the Levy Court could consider their adoption. One ordinance, however, APFO Central Water, was

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App. to Petrs.' Opening Br. in Supp. of the Mot. for Summ. J. on Procedural Claims ("Petrs.' App.") Vol. 3, APFO3211.

[6] New Castle County attempted to pass a similar ordinance, which the General Assembly later overrode with state legislation accomplishing the same goal and empowering the DOE to administer the program. *See* 14 *Del. C.* § 103(c); 9 *Del. C.* § 2661(c). DOE did not know initially whether similar legislation would be required to administer Kent County's program, and DOE officials promised to look into the matter to find a solution to administering APFO Schools.

deemed ready for public hearing and final consideration before the Levy Court. Accordingly, a hearing was scheduled for October 17, 2006.

At the October 17 public hearing,[7] the Levy Court considered APFO Central Water. Adoption of the ordinance would first create a new section in the Kent County Code, Section 187-90.2, which had not previously existed, for the provision of adequate public facilities generally; second, the substantive provisions of APFO Central Water would then become part of Section 187-90.2. Mr. Petit de Mange gave a brief background presentation on the proposed ordinance and the history of the County's efforts to address the perceived development crisis and the strain on the County's public facilities and services. One of the commissioners commented that the APFOs would not apply retroactively to pending applications, but Mr. Petit de Mange clarified that the APFOs, when enacted, would, in fact, be retroactive to June 13, 2006, the date they were first introduced in the Levy Court. The commissioners further discussed the substance of APFO Central Water, and then they opened the floor to public comment; just as before the Planning Commission, the public comments to the Levy Court were generally supportive of the ordinance, although some opposition was registered.

After the public comments, a motion was made to adopt APFO Central Water. The Levy Court then set about making several technical amendments to the

[7] *See generally* Petrs.' App. Vol. 2, Ex. A, APFO 0898-0916.

language of the ordinance to remove general references to the other APFOs, which, as a technical matter, did not yet exist in the County Code; some confusion ensued as to whether those amendments could be adopted without further public hearing before the Planning Commission. Eventually, after much discussion, the technical amendments were approved, and the Levy Court voted 6-1 to adopt APFO Central Water as amended.

The Levy Court reconvened on October 24, 2006, to consider the adoption of APFO EMS. That ordinance purported to impose on developers an impact fee, calculated on a per unit basis, for the provision of EMS in the County. At the hearing, Mr. Petit de Mange explained in detail how the impact fee would be calculated, although the formula he discussed was not specified in the legislation.[8] The Levy Court then proceeded to discuss other substantive considerations regarding APFO EMS, including the fact that, as proposed, the ordinance would conflict with 29 *Del. C.* § 9124(b), which explicitly prohibited a county government from imposing an impact fee for emergency medical services.

The Levy Court also solicited public comment on APFO EMS. The public comments were, once again, generally favorable and supportive, but not without some opposition. At the conclusion of those comments, the Levy Court proceeded

[8] *See* Minutes of Levy Court Hearing, Oct. 24, 2006, Petrs.' App. Ex. A., Vol. 3, at APFO 1096-1099; *see also id.* at 1102 (Petitioners' counsel expressed that Mr. Petit de Mange did an "excellent job" explaining the calculation of the fee under APFO EMS.).

to consider the adoption of the ordinance, notwithstanding the known conflict with 9 *Del. C.* § 9124(b). A technical amendment was introduced to conform APFO EMS to the general APFO provisions in County Code § 187-90.2 created by the adoption of APFO Central Water. A second amendment was then introduced to tie the effective date of APFO EMS to the (hoped for) repeal of 29 *Del. C.* § 9124(b), which was, at that time, pending before the General Assembly. With those amendments, APFO EMS passed unanimously, but was held in abeyance pending the repeal of 29 *Del. C.* § 9124(b) by the General Assembly.

Levy Court elections were held in November 2006 before the remaining two APFOs could be considered, and four of the seven sitting Levy Court commissioners were defeated. The remaining commissioners were joined in January 2007 by four new commissioners who, according to Petitioners, had campaigned on an "anti-development" platform. The newly constituted Levy Court set about addressing the unfinished APFO business of the prior Levy Court. To that end, the Levy Court immediately adopted a moratorium ordinance on January 16, 2007, stopping all development projects in Kent County pending adoption of the final two APFOs. Meanwhile, County staff and various state agencies continued revising APFO Roads and APFO Schools. Finally, the ordinances were deemed ready (or ready enough) for public hearing and consideration by the Levy Court on March 27, 2007.

At that hearing, the Levy Court first considered APFO Roads, which purported to establish a threshold at which a developer would be required to conduct a traffic impact study in connection with a proposed development and also the level of service (i.e., the traffic capacity) the roads surrounding a proposed development project would have to meet in order for the project to receive final approval. The floor was then opened to public comment. As with the other APFOs, the proposed APFO Roads garnered overwhelming public support but the opposition from the development community was more forceful than with the earlier APFO. Several individuals rose on behalf of the latter to object to the adoption of the ordinance, mainly because, in their view, the ordinance provided insufficient "grandfathering" for development applications submitted before the adoption of the new ordinance. In addition, some concerns were raised as to the interpretation of certain technical aspects of the ordinance.

At the close of public comment, there was a motion to adopt APFO Roads. As with the APFO EMS, a technical amendment was introduced to conform APFO Roads to the general provisions of Section 187-90.2; that amendment passed unanimously. A second amendment then was introduced imposing a sixty-day time limit for the filing of vested rights applications under the ordinance; that amendment also passed unanimously. Finally, a third amendment was introduced to change the acceptable level of service inside the "growth zone" from a level of

service “D” (DelDOT’s typical benchmark) to a level of service “C” (i.e., a more stringent standard providing for “better” service). That amendment passed unanimously as well. The Levy Court then voted unanimously to adopt APFO Roads as amended, with the commissioners citing general considerations of the quality of life for the citizens of Kent County, in addition to the overwhelming record of public support, as the reason for their decision.

The Levy Court next considered APFO Schools. The purpose of the ordinance was to ensure that Kent County school districts would have adequate capacity and facilities to accommodate the impact of new development and growth. Once again, the Levy Court opened the floor to public comment, and numerous citizens rose in ardent support of the ordinance as, perhaps, the most important of all the APFOs. Similarly, however, strident opposition was registered by the development community, again chiefly because of the lack of “grandfathering” for existing development plans.

At the close of public comment, approval of APFO Schools was sought. Once again, a technical amendment was introduced to conform APFO Schools to the general provisions of Section 187-90.2; that amendment passed unanimously. A second technical amendment was then introduced to adopt the DOE’s definitions of certain terms in the substantive provisions of APFO Schools; that amendment also passed unanimously. Finally, a third amendment imposing a sixty-day

deadline for the filing of vested rights applications under the ordinance was introduced, which, again, passed unanimously. With the amendments in place, APFO Schools was approved and adopted unanimously by the Levy Court, with the commissioners again citing general concerns about the quality of life of the citizens of Kent County, in addition to the overwhelming record of public support, as the reason for their decision to approve the ordinance.

Thus, by the end of March 2007 (in Petitioners' view, at least), the Levy Court had effectively changed the "rules of the game" for development projects in Kent County. Nevertheless, in the County's alleged "rush" to pass the APFOs, many nuances of the APFOs remained to be ironed out over the ensuing months in order to implement the Levy Court's mandates. Petitioners filed this action in late April 2007, challenging the validity of the APFOs as legislative acts, and, alternatively, claiming that Petitioners each have vested rights in their projects such that they should not be subject to the provisions of the APFOs.

III. CONTENTIONS

As noted, this memorandum opinion deals only with Petitioners' "procedural" challenges to the APFOs. Petitioners have raised fourteen separate procedural challenges; however, they have moved for summary judgment on only seven of those claims. In those seven claims, they assert that the APFOs: (1) violate 9 *Del. C.* § 4959(c) because the APFOs are retroactive to the date of their

introduction; (2) violate 9 *Del. C.* § 4911 because the amendments introduced by the Levy Court "substantively" amended the APFOs, thereby requiring another round of public hearings; (3) violate 9 *Del. C.* § 4110(i)(1) because the APFOs, which required various amendments, could not, by definition, have been in "the form required for final adoption" and also because the APFOs as introduced did not annotate the proposed changes to the County Code; (4) violate 9 *Del. C.* § 4926 because the County did not mail notice of the proposed ordinance changes to *every* resident in Kent County; (5) constitute an impermissible delegation of authority to the DOE to administer APFO Schools; (6) constitute an impermissible delegation of authority to DelDOT to administer APFO Roads; and (7) are unenforceable because they are so vague, ambiguous and subjective that they are incapable of objective interpretation and application.

Respondents have cross-moved for summary judgment on all fourteen of Petitioners' procedural challenges. In addition to their merits-based rejoinder to the claims on which Petitioners seek summary judgment, Respondents also assert that Petitioners' failure to brief their remaining seven procedural challenges in accordance with the parties' agreement to submit the procedural challenges on cross-motions for summary judgment constitutes a waiver of those challenges.[9]

[9] The Court addresses this issue *infra*, Part IV(B)(7).

IV. ANALYSIS

A. *Legal Standards*

Where, as here, the parties file cross-motions for summary judgment, and neither party argues that material facts are in dispute, the Court may treat those motions as a stipulation for decision on the merits based on the record submitted with those motions.[10] As such, the Court need not separately conclude that no material facts are in dispute, and it may weigh the evidence as it would in the context of a post-trial decision.

In addition, because several of Petitioners' claims require the Court to interpret and apply various statutes governing the County's exercise of its legislative powers, a brief overview of certain canons of statutory construction is warranted. "The goal of statutory construction is to determine and give effect to legislative intent."[11] A court will not engage in judicial interpretation of a statute where the statute is unambiguous because, in those instances, the plain meaning of the statutory language controls its meaning.[12] If, however, a statute is ambiguous, the Court will construe the statute in such a way as "will promote its apparent purpose and harmonize with other statutes."[13] A statute is ambiguous if it is

[10] Ct. Ch. R. 56(h); *see, e.g.*, *Farmers for Fairness v. Kent County*, 940 A.2d 947, 954-55 (Del. Ch. 2008).
[11] *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).
[12] *Id.*
[13] *Id.*

"reasonably susceptible to different conclusions or interpretations . . . ."[14] In addition, a statute might also be deemed ambiguous where "a literal interpretation [of the] words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature."[15]

B. *The Merits of the Parties' Cross-Motions*

1. Preliminary Matters

Before proceeding with an analysis of the parties' substantive claims, the Court pauses to address two preliminary matters. Respondents argue that Petitioners' challenges to both APFO EMS and APFO Central Water are barred by the sixty-day statute of repose, 10 *Del. C.* § 8126, governing, *inter alia*, challenges to the Levy Court's adoption of zoning ordinances.[16] Petitioners now concede that their challenges to APFO Central Water are barred by the statute. The parties disagree, however, about the application of § 8126 to APFO EMS.

At the time APFO EMS was adopted in October 2006, the fee it sought to impose on developers was expressly prohibited by 29 *Del. C.* § 9124(b). The Levy Court therefore tied the effective date of the ordinance to the General Assembly's

[14] *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007).
[15] *Dougherty v. Horizon House, Inc.*, 2008 WL 3488532, at *3 (Del. Super. June 25, 2008) (citation and internal quotation omitted).
[16] 10 *Del. C.* § 8126 requires that challenges to any amendments of zoning and subdivision ordinances be brought no later than 60 days after notice of the amendment is published.

repeal of § 9124(b), which later occurred in May 2007. Nevertheless, the Levy Court proceeded to publish the required notice of the adoption of APFO EMS in accordance with the 10 *Del. C.* § 8126 on November 4, 2006. The County takes the position that, by the express terms of the statute of repose, the sixty-day window in which Petitioners could bring a challenge to APFO EMS opened on that date and closed on or about January 4, 2007; therefore, Petitioners' challenge to APFO EMS is untimely and barred by the statute of repose. Petitioners counter, however, that if they had brought a challenge to APFO EMS within the period established by the statute of repose, but before the repeal of the obstructing statute, their claims would not have been ripe for adjudication by a court. Thus, given the unique confluence of the County's adoption of what, in essence, was a legal nullity until the General Assembly acted to repeal 9 *Del. C.* § 9124(b) and the strictures of the statute of repose, Petitioners would have found themselves in the impossible position of never having been able to challenge the ordinance, at least if the County's dogmatic reading of § 8126 is correct. In this instance, the Court concludes that a literal application of § 8126 would work an absurd result; therefore, § 8126, in this unusual context, must be construed to promote its apparent purpose in a harmonious manner.

The overarching purpose of § 8126 is to promote order and certainty when a legislative body enacts a land use ordinance by encouraging prompt challenges to

an adopted statute or ordinance. When the General Assembly enacted § 8126, however, it would have expected an immediate, or, at the very least, a definite future, effective date for the adopted legislation. In this instance, however, the effective date of APFO EMS was contingent upon the General Assembly's repeal of 29 *Del. C.* § 9124(b) at some unknown point (if ever) in the future. Thus, this is not an instance in which the Levy Court enacted an ordinance with a definite and known effective date. Instead, this is an instance in which the effective date of the ordinance was entirely contingent upon a third-party's (the General Assembly) taking a discretionary act in its own right to repeal 29 *Del. C.* § 9124(b). At the time APFO EMS was enacted, it was not clear when, if ever, the ordinance would become effective. Consequently, Petitioners' argument that they would not have been able to challenge the ordinance because their claim was not then ripe for adjudication is likely correct.

In light of that fact, a literal application of 10 *Del. C.* § 8126 in this instance would preclude Petitioners from ever having had an opportunity to challenge APFO EMS. This cannot be what the General Assembly intended when it enacted § 8126. Although on the one hand the purpose of § 8126 is to promote order, finality, and certainty to adopted legislation, it is not intended to deny citizens a fair opportunity to challenge an adopted ordinance. Under these circumstances, the Court concludes that the sixty-day time limit under § 8126 did not begin to run

until the General Assembly repealed 29 *Del. C.* § 9124(b). Section 9124(b) was repealed by the General Assembly in May 2007, and, therefore, Petitioners' challenge to APFO EMS was timely filed.

2. Count XIV – APFO Schools is Impermissibly Vague

Petitioners challenge the Levy Court's adoption of APFO Schools, which provides, in pertinent part:

> Before any proposed residential development project, other than a minor subdivision application, is accepted for consideration of approval by the Levy Court or Regional Planning Commission, a determination of compliance with the School Level of Service Standard of this Ordinance shall be rendered by the Department of Planning Services . . . . Such determination shall indicate that:
>
> (1) Available capacity exists to accommodate the demand for educational services with the addition of the proposed residential development; or
>
> (2) Planned capacity improvements are scheduled for completion within two (2) years of the date of Final Plat for Site Plan approval exclusive of any capacity enhancements created pursuant to previously approved developer-funded mitigation program; or
>
> (3) The developer has executed an agreement to pay mitigation to the school district to compensate for the impact of the proposed subdivision based upon the mitigation formula as per the Delaware Department of Education Regulations. Per household unit mitigation contribution amounts shall be paid directly to the subject school district by the developer and in accordance with the Department of Education Regulations.

The Petitioners argue that the mitigation formula referenced in the ordinance did not exist at the time APFO Schools was adopted, and it has not since been

prescribed by the DOE regulations because the DOE, evidently, lacks authority to enact regulations to accomplish Kent County's objective.[17] Therefore, in Petitioners' view, APFO Schools is impermissibly vague and ambiguous because it is incapable of being applied in any rational manner by reference to the words of the ordinance alone. The County argues that although the DOE has not (and perhaps could not have) enacted regulations to administer Kent County's APFO Schools, as required by the literal terms of the ordinance, the ordinance nonetheless is valid because eventually the County and the DOE determined that the formula specified in 14 *Del. C.* § 103(c), which provides for a similar mitigation calculation for New Castle County, could be used to administer APFO Schools.

A statute or ordinance is impermissibly vague "[i]f people of common intelligence must, of necessity, guess at its meaning and reach different conclusions as to its meaning . . . ."[18] Although the County may be correct that the New Castle County formula could be utilized as a workable solution, that is not in accord with the express terms of the ordinance. As noted, the ordinance squarely

[17] Marinucci Dep. 114-15. By 14 *Del. C.* § 103(c), DOE was expressly authorized to promulgate regulations for calculating similar mitigation assessments in New Castle County. No such comparable authority has been extended to DOE with respect to Kent County. *Compare* 9 *Del. C.* § 9661(c) *with* 9 *Del. C.* § 2661(c).

[18] *Bristow v. Del. Bd. of Exam'rs in Optometry*, 2005 WL 396336, at *5 (Del. Ch. Feb. 8, 2005). *See also Singer v. Davenport*, 264 S.E.2d 637, 642 (W. Va. 1980) (Zoning regulations "must be reasonably definite and carefully drafted so that property owners may know in advance what is required of them and what standards and procedures will apply.").

states that the mitigation payment is to be "based upon the mitigation formula *as per the Department of Education Regulations*." If one were to reference the DOE regulations, one would not find any specified formula to calculate the mitigation payments by developers of Kent County lands under APFO Schools or for educational purposes more generally. Therefore, the ordinance is incapable of rational application, rendering it impermissibly vague.[19]

Accordingly, Petitioners are entitled to summary judgment on their claim that APFO Schools is invalidly adopted and unenforceable.[20]

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[19] In addition to vagueness problems, the APFO Schools' reference to DOE regulations that do not exist presents delegation issues. Not only does DOE not have mitigation formula regulations other than those drafted pursuant to a legislative mandate regarding New Castle County, the County, in APFO Schools, provided no guidance as to how these changes should be determined.

It has been written, perhaps somewhat rigidly, "A legislative body . . . may not lawfully delegate its legislative power to others. This non-delegation principle is especially compelling when a zoning ordinance is involved, because such legislation regulates the right to the enjoyment of private property." *Marta v. Sullivan*, 248 A.2d 608, 609 (Del. 1968). "[T]o avoid unlawful delegation of legislative power, a statute must establish adequate standards and guidelines for the administration of the declared legislative policy and for the guidance and limitation of those in whom discretion has been vested; this to the end that there may be safeguards against arbitrary and capricious action, and to assure reasonable uniformity in the operation of the law." *Id.* The County may, in the appropriate circumstances on the expertise of various state agencies whose standards are based upon authority delegated by the General Assembly.

With no standards or guidelines in APFO Schools to direct the mitigation calculation process, there is an improper delegation. It should be noted that the question of whether a specific reference to (and incorporation of) the mitigation formula regulation adopted by DOE for New Castle County in APFO Schools would have sufficed is not before the Court because that it is not what APFO Schools purported to do. Accordingly, no view is expressed as to whether any such effort would have survived challenge.

[20] The Court recognizes that the consequences of this conclusion are unfortunate. New residential developments bring additional students and impose significant additional burdens on the schools. The funding sought through APFO Schools would mitigate to an extent those additional burdens. Just because the purpose of an ordinance is laudable does not relieve its enactors of the responsibility of complying with fundamental legislative doctrine. DOE had no applicable regulation, and the ordinance was devoid of any standards for setting the mitigation

3. Count VII – Violation of 9 *Del. C.* § 4959(c)

Petitioners argue that the APFOs' retroactive application to June 13, 2006, violates 9 *Del. C.* § 4959(c), which provides, "Any application for a development permit filed or submitted prior to adoption or amendment under this subchapter of a comprehensive plan or element thereof shall be processed under the comprehensive plan, ordinances, standards and procedures existing at the time of such application."[21] Petitioners contend that the APFOs constitute an "amendment" of an "element" of the County's comprehensive plan, and, therefore, because they submitted their applications for a development permit *before* the APFOs were adopted by the Levy Court, by force of § 4959(c), they are exempt from complying with the APFOs. This is the same argument advanced by Petitioner Upfront Enterprises, LLC and rejected by this Court as a matter of law in connection with its application for a preliminary injunction in August 2007.[22] Nothing has changed in the record or the law since that time, and the Court adopts its prior analysis and holding with regard to Petitioners' argument. Accordingly, the Respondents are entitled to summary judgment on this claim.

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fees. The source of the difficulty may well be found in the unusual evolution of the process by which DOE was tasked by the General Assembly to calculate such fees for projects in New Castle County. That amounts, however, to an explanation, not a vindication.

[21] 9 *Del. C.* § 4959(c).

[22] *See Upfront Enters., LLC v. Kent County Levy Court*, 2007 WL 2459247, at *6-8 (Del. Ch. Aug. 9, 2007).

4. Count VIII – Violation of 9 *Del. C.* § 4911

Petitioners argue that the Levy Court's amendments to the APFOs addressing EMS and roads constituted "substantive" changes to the text of the ordinances, which, in their view, required a rehearing before the Planning Commission in accordance with 9 *Del. C.* § 4911. At the very least, they argue, the proposed amendments should have been submitted for a public hearing before the Planning Commission before the Levy Court could adopt and enact the proposed ordinances. Petitioners' strained reading of § 4911 is not only incorrect as a matter of law, but it also would subject the Levy Court to an unwieldy legislative process that could never have been intended by the General Assembly.

9 *Del. C.* § 4911 provides:

> (a) The county government may, from time to time, make amendments, supplements, changes or modifications (herein called "changes") with respect to the number, shape, boundary or area of any district or districts, or any regulation of, or within, such district or districts, or any other provision of any zoning regulation or regulations, but no such changes shall be made or become effective until the same shall have been proposed by or be first submitted to the [Planning Commission].
>
> (b) With respect to any proposed changes, the [Planning Commission] shall hold at least 1 public hearing, notice of which hearing shall be published at least 15 days before the date of the hearing in a newspaper of general circulation in the County. The notice shall contain the time and place of hearing, and shall specify the nature of the proposed change in a general way and shall specify the place and times at which the text and map relating to the proposed change may be examined.

> (c) Unless the [Planning Commission] shall have transmitted its report upon the proposed changes within 45 days after acceptance of a completed application including all supporting documentation, by the Commission, the county government shall be free to proceed to the adoption of the changes without further awaiting the receipt of the report of the [Planning] Commission. In any event, the county government shall not be bound by the report of the [Planning Commission]. Before finally adopting any such changes, the county government shall hold a public hearing thereon, at least 15 days notice of the time and place of which shall be given at least 1 publication in a newspaper of general circulation in the County.

There is no ambiguity in the text of § 4911. Plainly it requires the Levy Court to submit any proposed zoning ordinance to the Planning Commission for a public hearing before it can be adopted and enacted. The Levy Court did precisely that in this case. To be sure, the Levy Court proposed sweeping changes to its zoning ordinances with the APFOs. Consistent with 9 *Del. C.* § 4911, however, the Levy Court referred its proposed changes—in the form of draft proposed ordinances—to the Planning Commission for a public hearing, which was held on July 19, 2006. At that hearing, the public had an opportunity to participate in the legislative process and to express its views—pro and con—with respect to the Levy Court's objective in enacting the APFOs. Indeed, the public was not limited simply to commenting in favor of or against the APFOs as proposed by the Levy Court; it also could have suggested any number of alternatives to the APFOs for the Levy Court's consideration, if it so desired.

Following the public hearing, and consistent with 9 *Del. C.* § 4911(c), the Planning Commission reported to the Levy Court that it should adopt the proposed APFOs. The Levy Court then proceeded to enact the APFOs. There is no dispute that the Levy Court made technical amendments to the APFOs, and, in some instances, it even made substantive modifications to the details of the APFOs before finally enacting the ordinances. In their effort to attack each and every change the Levy Court made to the proposed ordinances, however, Petitioners lose perspective. The Levy Court proposed to enact ordinances that would address adequate public facilities for roads, schools, EMS, and water; at the end of the proverbial day, the ordinances it adopted, as promised, provide for precisely that.[23] Petitioners' vehemently disagree with the policy choices embodied in the APFOs, but their complaints are nothing more than quibbles with the legislative prerogative of the Levy Court commissioners; thus, ultimately, their remedy must be found, if at all, politically and not judicially.

Section 4911 is not intended to be an impediment to the Levy Court's operation. Nor is it intended to empower the Planning Commission or the public to act as a super-legislature, scrutinizing every word and every policy choice in

[23] Petitioners' argument also ignores the fact that § 4911 should be read in light of other provisions of Title 9 governing the County's ability to enact ordinances. Thus, under the County's general enabling statute, the Levy Court is authorized to introduce ordinances and to amend those ordinances provided that the amendments do not change the substance of the ordinance. 9 *Del. C.* § 4110(i)(2).

ordinances the Levy Court enacts. It is, instead, intended to provide a reasonable opportunity for the public (1) to be made aware of what the Levy Court intends to change in the zoning ordinances and regulations, and (2) to participate in that process, if they so choose, by submitting oral or written comments—pro, con, or otherwise—to the Planning Commission at the designated public hearing time. The Levy Court may then consider the recommendations of the Planning Commission and the public's comments on the proposed legislation, but its legislative authority and discretion—at least insofar as it seeks to enact legislation addressing the same subject matter—are in no way circumscribed by either of those factors.[24]

Accordingly, because Respondents satisfied the public hearing requirements of 9 *Del. C.* § 4911, and because they enacted legislation addressing the same subject matter on which they had previously sought public comment, they are entitled to summary judgment on this claim.

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[24] Thus, for example, the Levy Court could not submit only APFO Schools for public comment, and then proceed to enact an ordinance adopting APFO Schools, APFO Roads, and APFO EMS. Because in this example the substance of APFO Roads and APFO EMS was not submitted for public hearing before the Planning Commission, that subsequent legislative act by the Levy Court would violate § 4911. Alternatively, however, as was done here, if the Levy Court submitted APFO Schools to the Planning Commission for public hearing, and then it subsequently enacted an ordinance providing for adequate public facilities for schools, but, in the process of adopting that ordinance, the Levy Court decided to make substantive changes to the specific provisions for schools, it did not have to resubmit the ordinance or even the proposed amendments to the Planning Commission for further public hearing in accordance with § 4911; the public had its opportunity to comment on the subject matter of the ordinance; the Levy Court was free to exercise its legislative discretion in terms of the substantive policies of the ordinance addressing that subject matter.

5. Count IX – Violation of 9 *Del. C.* § 4110(i)(1)

Petitioners also allege that the APFOs failed to comply with the requirements of 9 *Del. C.* § 4110(i)(1), which provides, in pertinent part:

> Every proposed ordinance shall be introduced in writing and in the form required for final adoption . . . . Any ordinance which repeals or amends an existing ordinance or part of the County Code shall set out in full that part of the ordinance, sections or subsections to be repealed or amended, and shall indicate the matter to be omitted by enclosing it in brackets and shall indicate new matter by underscoring or italics.

Petitioners argue, first, that none of the APFOs was "in the form required for final adoption" because they all required amendments by the Levy Court and, second, that the APFOs did not contain bracketing and italicizing of their text to indicate deletions and additions, even though the APFOs purported to "amend" Section 187-90.2 of the County Code.

In interpreting 9 *Del. C.* § 4110(i)(1), the Court again calls upon the canons of statutory construction and seeks to ascertain the intent of the General Assembly. Once again, the Court concludes that the statute is not ambiguous. Petitioners focus on the requirement that any proposed ordinance be "introduced . . . in the form required for final adoption." They argue that because each APFO required various amendments when it was enacted, the ordinances by definition could not have been in the "form required for final adoption." Petitioners miss the point of the statute. When the APFOs were introduced in June 2006, Section 187-90.2 of the County Code did not exist; thus, each APFO was a complete legislative act in

the form required for final adoption to create the relevant code sections to implement the substantive requirements of the ordinance. Accordingly, each APFO, *when it was introduced*, was, in fact, in the "form required for final adoption" by the Levy Court; that is all § 4110(i)(1) requires.

Petitioners' complaints that the APFOs did not have the necessary bracketing and italicizing required of legislation "amending" existing portions of the County Code also lack merit. First, as noted, it is clear from the language of the statute that § 4110(i)(1) addresses only the technical requirements of proposed legislation at the time it is first introduced in the Levy Court. Thus, for example, if the Levy Court introduces legislation to amend an *existing* portion of the County Code, it must bracket and italicize the proposed legislation accordingly to signify the deletions and insertions to be made by the proposed ordinance. At the time the APFOs were introduced in June 2006, however, Section 187-90.2 of the County Code did not exist and, thus, the APFOs, standing alone, could not (and did not) amend anything, even though the ordinances were, perhaps, infelicitously titled as "amendments." Therefore, it was not necessary for the proposed ordinances to have any bracketing or italicizing under § 4110(i)(1) at the time they were introduced in the Levy Court.[25]

[25] The complex APFO ordinances are, perhaps by their nature, not models of clarity, but any reasonable person could have reviewed the draft legislation and discerned what the ordinances intended to accomplish and, in general, what would be required.

Furthermore, to the extent Petitioners argue that after APFO Central Water was adopted, the subsequent APFOs did, in fact, amend an existing portion of the County Code and, therefore, had to comply with § 4110(i)(1), their argument again misses the mark. Section 4110(i)(1) applies to the *introduction* of new legislation. Once legislation has been introduced, however, the bracketing and italicizing requirements of § 4110(i)(1) no longer apply to later amendments of the ordinance. Indeed, by force of the very next subsection, § 4110(i)(2), the Levy Court is authorized to adopt an ordinance "with or without amendment or reject it . . . ."[26] Thus, a reasonable and logical reading of § 4110(i) as a whole demonstrates the error of Petitioners' argument. If the Levy Court is authorized to adopt a previously introduced ordinance with amendments, it cannot possibly be that § 4110(i)(1) applies to those amendments. Much like the argument Petitioners advanced with respect to 9 *Del. C.* § 4911, their reading of § 4110(i) would impose cumbersome and impossible requirements on the Levy Court that would leave it stuck in an endless revision and public hearing loop until it managed to get each and every piece of legislation exactly perfect. Such an unremittingly burdensome process cannot reasonably have been intended by the General Assembly.

[26] Under 9 *Del. C.* § 4110(i)(2), a proposed ordinance needs only to be resubmitted through the statutory requirement mill if the Levy Court amends the ordinance as to a matter of substance (e.g., an ordinance purportedly addressing schools is amended to also address roads).

In sum, because Respondents met the requirements of 9 *Del. C.* § 4110(i)(1) in enacting the APFOs, they are entitled to summary judgment on these claims.

6. Count XI – Violation of 9 *Del. C.* § 4926

Petitioners also contend that Respondents violated the requirements of 9 *Del. C.* § 4926 by failing to mail a required notice of a "zoning change" to all affected landowners (i.e., every property owner in Kent County). 9 *Del. C.* § 4926 provides:

> With respect to any proposed zoning change, unless the owner applies for the change or consents to the change, the county government shall notify the owner of the property and all adjacent property owners to the extent and in the manner the county by ordinance so provides as of June 28, 2000, mailed at least 7 days prior to the initial hearing upon such zoning change.

The term "zoning change" is not defined in Title 9 of the Delaware Code. Petitioners argue, however, that "zoning" is defined in the County Code as, "The reservation of certain specified areas within a community, county or city for building and structures, or use of land, for certain purposes with other limitations such as height, lot coverage and other stipulate requirements." In Petitioners' view, the phrase "other stipulated requirements" encompasses the APFOs.

In *Farmers for Fairness v. Kent County*, the Court considered, without deciding, the possible implication of 9 *Del. C.* § 4926 when the County seeks to enact zoning ordinances of broad applicability through the mechanism of an

overlay zone.[27] The Court noted that "placing additional utilization restrictions on an underlying district through the use of an overlay zone, while not implicating the uniformity requirement of [9 *Del. C.*] § 4902(b), might, in certain circumstances, result in a zoning change and require extensive notice to landholders."[28] Petitioners cling to the Court's observations in *Farmers for Fairness* to support their contention the § 4926 applies to the adoption of the APFOs.

The APFOs, unlike the ordinance at issue in *Farmers for Fairness*, are ordinances of general applicability throughout the County. They do not create overlay zones such that properties with the same zoning are treated differently within and without the overlay zone; thus, they are not tantamount to an effective "zoning change" because property owners with similar zoning are still able to utilize their property in the same way. Petitioners attempt to draw a distinction by arguing that the brunt of the APFOs falls more heavily in those regions of the County where facilities are less adequate. That may be so, but it does not change the rights of the landowner to use her property—it, perhaps, just makes it more expensive.[29]

Because the APFOs are statutes of general applicability to the same zoning categories throughout the County and do not result in an actual or effective change

[27] 2007 WL 1413247, at *8 n.35 (Del. Ch. May 1, 2007).
[28] *Id.*
[29] The APFOs apply only to property that can be used for residential purposes.

in the use to which an owner may put his property, the Court concludes that the APFOs did not constitute a "zoning change" within the meaning of § 4926. Respondents, therefore, are entitled to summary judgment on this claim.

7. Count III – Impermissible Delegation of Authority to DelDOT

Petitioners take issue with DelDOT's involvement in the administration of APFO Roads. Petitioners contend that APFO Roads contains no meaningful guidelines for determining the "area of influence" of the traffic impact study. That argument might have some merit if one were not bound by the plain terms of the ordinance. Contrary to Petitioners' argument, however, the ordinance sets forth in detail the general guideposts to be utilized by DelDOT, the County, and the developer in developing the parameters for the traffic impact study at the initial "scoping" meeting. Interpreting those guideposts to apply to a particular project, obviously, is highly technical and requires the considered and professional judgment of traffic engineers, but the mere fact that the ordinance allows for an appropriate exercise of professional judgment does not render it an impermissible delegation of authority.

Petitioners also question the fact that APFO Roads specifies a level of service "C," while DelDOT typically only builds roads to a level of service "D"; Petitioners further contend that DelDOT *might* not approve the mitigation measures necessary to achieve a level of service "C" as required by APFO Roads,

thereby effectively granting DelDOT veto power over any development project. Petitioners may have a valid point, but their argument does not invalidate the ordinance, at least at this point, because it is entirely speculative. Perhaps Petitioners, individually, will have valid "as applied" challenges if (ever) they are injured by DelDOT and the County in that manner, but the Petitioners, must await an appropriate factual context to consider such claims. On its face, APFO Roads does not grant any "veto" power to DelDOT as Petitioners allege; therefore, the ordinance is not an impermissible delegation of power.

In sum, APFO Roads properly seeks knowledgeable, professional input from the relevant state agencies to achieve the objectives of the ordinances. Land use is a complex, multi-disciplinary function, and the County's deference to the relevant state agencies, particularly in those instances where the State has a considerable interest in the subject matter the County attempts to regulate, is appropriate. Moreover, to the extent the APFOs require agency employees and officials to exercise discretion, the Court is satisfied that the ordinances set out sufficient guidelines to enable a reasonable professional to apply them to a particular project, even if that task ultimately proves challenging. Accordingly, Respondents are entitled to summary judgment on these claims.

8. Count XIV – APFOs EMS and Roads are Too Vague and Ambiguous to be Enforced

Petitioners' final argument is that the APFOs as enacted are unenforceable because they are unconstitutionally vague and ambiguous. Generally, a statute is presumed valid and the party challenging the statute bears the burden of proving it invalid.[30] A statute or ordinance is impermissibly vague "[i]f people of common intelligence must, of necessity, guess at its meaning and reach different conclusions as to its meaning . . . ."[31] Typically, however, such questions are determined "as applied" in a particular context;[32] thus, Petitioners have a difficult task in making a facial challenge to the ordinances.

In particular, Petitioners complain that APFO EMS and APFO Roads are impermissibly vague and ambiguous because they fail to specify specific formulas necessary to accomplish the goal of the ordinance. Petitioners' argument, however, founders upon their misconception of the enabling nature of the APFOs. The ordinances are not intended to specify all of the details necessary to implement the APFOs in a practical sense, nor must they. Instead, the APFOs state broad policy objectives and provide enabling authority and general guidance to allow the Planning Commission, County staff, and DelDOT to determine appropriate regulations and procedures to implement the goal of the APFOs.

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[30] *E.g.*, *Farmers for Fairness*, 940 A.2d at 956 n.43.
[31] *Bristow*, 2005 WL 396336, at *5.
[32] *See id.*

Statutes and ordinances in a complex regulatory framework, such as land use, must not, as a practical matter, be required to specify every detail and account for every contingency in order to avoid failure on vagueness grounds. In this instance, each of the APFOs makes reasonable reference to appropriate regulatory departments and agencies to determine the specific details required to implement the APFO. Simply because the necessary formulas may not have existed at the time the APFOs were enacted or because it took the County staff and the relevant agencies several months to develop a workable procedure for implementing the APFOs does not render them impermissibly vague and ambiguous; instead, any reasonable person reading the statute would know where to look or whom to contact to determine what was required to comply with the APFO. Whether, in the interim, the alleged indeterminacy of the APFOs worked an unjust result as applied to any particular Petitioner (or others) is not presently before the Court. In any event, the Court concludes that the APFOs, as drafted, were not impermissibly vague and ambiguous, and, accordingly, Respondents are entitled to summary judgment on these claims.[33]

[33] The Petitioners have justifiably raised concerns about timing. Kent County's land use procedures require that certain progress be achieved within a certain time limit or else the applicant must start anew. It is a regulatory policy that makes sense. As these proceedings demonstrate, land use rules change with time and there should be a disincentive for a developer to file an application and dawdle. It is desirable that developments completed at about the same time be subject to similar rules.

Nonetheless, those progress deadlines can unjustly work a hardship on the developer. For example, if the regulatory body imposes burdensome requirements; the developer successfully

9. Counts I, X, XII, XIII, XXII, XXIII, and XXIV – Respondents' Waiver Argument

The parties filed a stipulation with the Court on May 2, 2007, purporting to set a schedule for resolving Petitioners' numerous claims. To that end, Petitioners dismissed several claims without prejudice. In addition, the parties agreed to bifurcate the "procedural" claims relating to the adoption and enactment of the APFOs from the "substantive" claims relating to the individual Petitioners' vested rights and equitable estoppel claims. In connection with the procedural claims, the parties agreed as follows:

> 1. Litigation of the claims stated by the Fourth Amended Petition in this action (filed by the Petitioner [sic] on October 11, 2007) shall proceed as follows:
>
> . . .
>
> b. The claims stated by Counts I through III (inclusive), Counts VII through XIV (inclusive), and

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challenges the unjustly-imposed burdens; and the deadline passes before the litigation is resolved, then what is the equitable remedy under those circumstances? If one assumes that, but for the improvidently-adopted regulatory requirements and the successful challenge of such requirements, the developer would have complied with the appropriate deadlines, the delay caused by the successful challenge should not prejudice the developer. On the other hand, if the challenge is unsuccessful, then it would seem that the dispatch with which litigation is resolved is simply the developer's risk. In other words, an unsuccessful challenge to a valid regulatory requirement cannot, by itself, extend otherwise appropriate deadlines. A court of equity, of course, has broad remediable power. Simplistically framed, the goal is to put the party in the same place in which he would have found himself but for the untoward conduct. Thus, as a general rule—and this, like most equitable concepts—is not readily reduced to a black letter rule—when the approval process would have been timely completed but for the intervening improperly adopted regulatory requirement, the time period for completion of the approval process should be extended as a component of the comprehensive equitable relief to which the successful litigant is entitled.

> Counts XXII through XXIV (inclusive) of the Fourth Amended Petition (hereinafter referred to as "the Procedural Challenges") shall be bifurcated from the ["Substantive Challenges"].
>
> . . .
>
> d. The Procedural Challenges shall be litigated and adjudicated on an expedited basis, according to the following schedule:
>
> > (i) Discovery upon the Procedural Challenges shall be concluded no later than May 9, 2008 . . . ;
> >
> > (ii) The Petitioners shall file a Motion for Summary Judgment on the Procedural Challenges and a combined Opening/Answering Brief no later than June 16, 2008; [and]
> >
> > (iii) The Respondents shall file a Reply Brief no later than July 14, 2008[.]

The parties disagree whether the stipulation contemplated submission of all the procedural claims or, as Petitioners' read the stipulation, only those deemed appropriate for resolution on summary judgment.[34] As the Court reads the stipulation, the better reading appears to be that the parties, in fact, agreed to submit *all* of the procedural claims on cross-motions for summary judgment because, as both parties concede, there are no disputed issues of material fact with

[34] This is truly a curious position. The parties agree that no material facts are in dispute with respect to the process by which the APFOs were adopted; therefore, all of Petitioners' procedural claims present only questions of law as to whether or not the APFOs were validly adopted and enacted; one would imagine that would render those claims ideal for resolution on summary judgment. Exactly why Petitioners believe some, but not all, of their procedural claims are ripe for summary judgment is not clear.

respect to the process by which the Levy Court adopted the APFOs. Thus, it is not clear what Petitioners hope to accomplish by holding a trial on certain of their procedural claims or why they believe that the Court can resolve, for example, Count IX (failure to comply with 9 *Del. C.* § 4110(i)(1)) on summary judgment, but it cannot resolve Count X (failure to comply with 9 *Del. C.* § 4110(i)(2)) without a trial.

It is true that the Stipulation does not say that the failure to brief any of the procedural challenges will result in their dismissal. The Stipulation, nonetheless, does establish that the procedural challenges will all "be litigated and adjudicated," in accordance with the Stipulation which certainly suggests the expectation that all such issues would be resolved through one motion. If the claims are to be adjudicated through a motion for summary judgment and some claims are brief while other claims are not briefed, the notion of leaving such procedural claims for later resolution is clearly inconsistent with the terms of the Stipulation. Thus, although it may fairly be perceived as somewhat harsh, all procedural claims were to have been addressed through the briefing of the summary judgment motion in accordance with the Stipulation and those which were not briefed must be deemed to have been abandoned or waived. Accordingly, those claims will be dismissed.

V. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Petitioners and against Respondents on Count XIV of Petitioners' Fourth Amended Petition and in favor of Respondents and against Petitioners on Counts I through III (inclusive), Counts VII through XIII (inclusive), and Counts XXII through XXIV (inclusive) thereof.

IT IS SO ORDERED.